Supreme Court, U.S.
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No. 95-1902

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE UPJOHN COMPANY,
Petitioner,

v.

BEVERLY SCOVISH,
ADMINISTRATRIX OF THE ESTATE OF
WALTER SCOVISH,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Pursuant to Rule 15 of the Supreme Court Rules, the Petitioner, The Upjohn Company, hereby submits this Reply Brief addressed to a new point raised in the brief in opposition: i.e., that the "taking" issue was never properly presented, preserved, or decided in the state court system. Given the context in which it arose, the issue was, in fact, properly preserved and presumptively considered.

To appreciate this point, it is necessary to understand that the "taking" issue arose out of a discovery controversy. That the "taking" came clothed in the garb of a discovery order does not detract from the fact that the "taking" claim was expressly presented to the trial court.

An attempted appeal at this point was the only manner in which the "taking" claim could be meaningfully reviewed. In dismissing the appeals on this issue for lack of a final judgment, citing *Melia v. Hartford Fire Ins. Co.*, 202 Conn. 252, 520 A.2d 605 (1987), the Connecticut appellate courts effectively rendered the "taking" issue unreviewable. For these reasons, the "taking" issue was properly presented below for purposes of this petition.

As the Respondent indicates at page 5 of her brief in opposition, the Petitioner expressly raised the constitutional "taking" issue in its Motion to Reargue Plaintiff's Motion to Compel. Specifically, the Petitioner stated in the trial court as follows:

> The Court's ruling may also constitute a "taking" of private property for public use without just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution

> and Art. I, § 11 of the Connecticut Constitution. Although the court has not prohibited Upjohn from using its own data base, the Supreme Court has noted: "Government action short of acquisition of title or occupancy, has been held, if its effects are so complete as to deprive the owner of all or most of his interests in the subject matter, to amount to a taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-05 (1984). Here, the court's ruling will have tremendous and unfair economic impact. It would undermine "all or most" of the value of the Halcion database by giving plaintiffs an important tool created and used by Upjohn's attorneys to advise and defend Upjohn in litigation.

Defendant The Upjohn Company's Motion to Reargue Plaintiff's Motion to Compel, December 12, 1995, at 5 n.2.

This text clearly raised the constitutional issue for the trial court's consideration. The standard for preservation as articulated by *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) has been satisfied.* In denying the Motion to Reargue, the trial court is presumed to have rejected the "taking" claim.

The appellate courts have effectively ratified the trial court's rejection of the "taking" claim by pretermitting any merits review. The Petitioner was never permitted to address the constitutional issue in the Appellate Court or the Connecticut Supreme Court due to the procedural posture of the appeal.

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* The "taking" issue was considered properly presented in *First English* notwithstanding the arguable lack of specificity in its original articulation by the appellant as well as controversy about the means of disposition by the lower courts.

The issue presented in the original appeal was whether the court erred in ordering the production of the subject database. Because a Motion to Dismiss the appeal was granted, the substantive issues, including the constitutional issue, were not permitted to be presented to the Appellate Court. The same procedural result occurred upon the filing of a petition with the Connecticut Supreme Court. Because of the final judgment rule, the Petitioner was not permitted to file briefs in any Connecticut appellate court on any issue. There was thus never an opportunity to present or argue the merits of the "taking" issue in the Connecticut appellate system.

The Connecticut cases cited by Respondent regarding waiver of an issue on appeal are inapposite. In *Hayes v. Smith*, 194 Conn. 52, 480 A.2d 425, 433 n.12 (1984), the Connecticut Supreme Court specifically noted that the point held to be waived was one not raised in either brief or oral argument. "[Plaintiff] has not developed this claim at all either in her brief or in oral argument before us." *See also Bridgeport Hosp. v. Com'n on Human Rights and Opp.*, 232 Conn. 91, 653 A.2d 782 (1995) (fully briefed and argued). In stark contrast, because of the unavailability of interlocutory appeal of the "taking" issue in this case, no brief could be filed or argument presented on any issue in any appellate court.

The record in this case is largely an artifact of a process in which the substantive "taking" issue became unreviewable because of its procedural context. If this petition is dismissed because of Respondent's procedural objections, a true review on the merits will never be obtainable. The final judgment rule and the policy against interlocutory appeals in the Connecticut state courts will ensure that this important

and potentially recurring "taking" issue will never see the light of day.

For these reasons, the petition should not be rejected on the ground that the issue was not properly presented below.

Respectfully submitted,

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